

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: CAROL ANKENBRANDT, AS NEXT FRIEND AND
MOTHER OF L.R. AND S.R., Petitioner V. JON A.
RICHARDS AND DEBRA KESLER

CASE NO: 91-367

PLACE: Washington, D.C.

DATE: March 31, 1992

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 CAROL ANKENBRANDT, AS NEXT :
4 FRIEND AND MOTHER OF L.R. :
5 AND S.R., :
6 Petitioner :
7 v. : No. 91-367
8 JON A. RICHARDS AND DEBRA :
9 KESLER :

10 - - - - -X
11 Washington, D.C.

12 Tuesday, March 31, 1992

13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States at
15 11:10 a.m.

16 APPEARANCES:

17 RICHARD LYNN DUCOTE, ESQ., New Orleans, Louisiana; on
18 behalf of the Petitioner.

19 PAUL S. WEIDENFELD, ESQ., New Orleans, Louisiana; on
20 behalf of the Respondents.

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1 P R O C E E D I N G S

2 (11:10 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in No. 91-367, Carol Ankenbrandt v. Jon A. Richards.

5 Am I pronouncing your name correctly?

6 MR. DUCOTE: Ducote, Chief Justice.

7 CHIEF JUSTICE REHNQUIST: Ducote -- Mr. Ducote.
8 You may proceed.

9 ORAL ARGUMENT OF RICHARD LYNN DUCOTE

10 ON BEHALF OF THE PETITIONER

11 MR. DUCOTE: Mr. Chief Justice and may it please
12 the Court, I represent two young girls, one 9 and one 7,
13 who come before you through their mother as their next
14 friend. Their parents were divorced and their mother was
15 awarded full custody, and during the court-ordered
16 visitation they were physically and sexually molested by
17 their father and his girlfriend.

18 Because of the abuse, the Jefferson Parish,
19 Louisiana Juvenile Court through its child protection
20 statutes permanently terminated all the parental rights of
21 the father and permanently enjoined him from having any
22 contact whatsoever with the children again. Therefore,
23 under State law he is a legal stranger to them. That
24 decision was never appealed and is final.

25 After that decision, the children filed suit

1 against their father and his girlfriend in tort, in
2 Federal court in Louisiana, under diversity of
3 citizenship, because they were no longer residing in the
4 same State.

5 The district court in the Fifth Circuit through
6 the case out saying what this really is is a domestic
7 relations case over which the Federal courts have no
8 jurisdiction.

9 I think it's first important to note what this
10 case is not. This case is not about establishing a new
11 Federal cause of action. This case has nothing to do with
12 the concerns expressed by the Chief Justice and other
13 Members of this Court about creating new Federal causes of
14 action such as the actions now pending before Congress
15 concerning making all crimes against women perhaps civil
16 rights actions which could be brought in Federal courts,
17 or against making all crimes committed with handguns
18 Federal offenses.

19 There's no question, and it's never been
20 contested in this case, that all of the elements of
21 diversity have been satisfied.

22 QUESTION: Well, we could go further, could we
23 not, Mr. Ducote, in saying what the case is not about, in
24 saying that it is not about a decree of divorce, it is not
25 about child custody, it's not about probate -- something

1 like that?

2 MR. DUCOTE: That's correct. It's a simple
3 diversity tort action. Every tort action under diversity
4 is a State and a local cause of action, just as this case
5 is. If these children had been, say, run over by their
6 father by an automobile they would have Federal relief.

7 If they had been sexually molested, say, by
8 their minister or by their schoolteacher, they would have
9 a Federal forum. Perhaps -- and it's not clear under the
10 Fifth Circuit's test where the line would be drawn, but
11 perhaps if it had been an uncle -- an uncle or an aunt or
12 a first cousin who had molested them, they'd also be able
13 to sue in Federal court under diversity of jurisdiction.

14 Why is it, then, that the Federal courts can
15 abstain or simply refuse to hear a case because it's the
16 father who's involved, and I submit that they can't. I
17 don't believe that the test of Federal jurisdiction is
18 whether or not we want to get involved, when the Federal
19 courts say I don't want to get involved because it sounds
20 too much like a family matter. The real question here --

21 QUESTION: Well, but you -- in your earlier
22 answers to the chief justice you seem to be saying that
23 well, if it were a family matter, that would be a
24 different question.

25 As I understand, your position is if it were

1 probate, if it were any traditional family matter, there
2 would still be no basis for the Federal court staying out,
3 right?

4 MR. DUCOTE: Well, one of the questions the
5 court asked is whether or not there is a Federal -- a
6 domestic relations exception to Federal jurisdiction.

7 QUESTION: That's right.

8 MR. DUCOTE: My position is that if the
9 diversity criteria are met and the amount in controversy
10 exceeds the \$50,000 threshold, no matter what the source
11 of the money is, it should be within Federal jurisdiction
12 unless Congress determines otherwise.

13 QUESTION: So you can sue in Federal court for
14 divorce.

15 MR. DUCOTE: Well, I don't believe so, because
16 divorce itself has no \$50,000 threshold, nor does child
17 custody, nor does child visitation. If what is sued for
18 is money, then yes, if the \$50,000 threshold is met and
19 the diversity criteria are met, the Federal courts have
20 jurisdiction until Congress says otherwise.

21 QUESTION: Well, what if a husband sues for a
22 divorce and requests a property settlement agreement,
23 saying that the amount of controversy, our property,
24 amounts to several hundred thousand dollars. Would that
25 meet the jurisdictional amount for diversity?

1 MR. DUCOTE: Unfortunately, at this point, given
2 the fact that the Federal jurisdiction is defined by
3 Congress and Congress is not exempted, that sort of
4 question from the diversity of jurisdiction, I think to be
5 true to the Constitution, yes, the Federal courts would
6 have jurisdiction.

7 QUESTION: We really don't have to decide that
8 question, do we, to rule in your favor? There could be a
9 domestic relations exception which embraced divorce, child
10 custody, and still did not extend as far as your case.

11 MR. DUCOTE: That's absolutely correct.

12 QUESTION: What about a suit for the partition
13 of real estate in another State? I mean, that, like
14 divorce, has been considered traditionally a nontransitory
15 cause of action, so you had to sue within the State where
16 the property was. If you sued in another State's courts
17 you couldn't get it, but your position is you can sue in
18 any Federal court for it.

19 MR. DUCOTE: My position is that if the
20 diversity criteria are met and the amount in controversy
21 exceeds \$50,000 and the State law that's applicable in the
22 jurisdiction where the Federal court sits allows for that
23 cause of action, the Federal courts under Article 3 and
24 the congressional mandate under 28 U.S.C. section 1332
25 says that you have jurisdiction.

1 QUESTION: Don't you think that that
2 congressional mandate took into account accepted notions
3 of transitory causes of action and nontransitory causes of
4 action so that it was entirely understood that to get a
5 divorce you could only sue in the court of the State where
6 the people are resident?

7 MR. DUCOTE: I think first you have to look at
8 the State law, and whatever the State where the forum sits
9 says about what can be done with property that another
10 State would control.

11 Unfortunately, and as all of the Law Review
12 articles and Judge Weinstein in the Spindel case point
13 out, most of what the courts have said about the domestic
14 relations exception have been on very weak grounding, that
15 these things about well, ecclesiastical courts used to do
16 this, and courts of equity didn't do this and all, just
17 don't apply, and I think with the position, unfortunately,
18 where we have to look at what the Constitution says about
19 who decides what Federal courts have jurisdiction over and
20 return the responsibility to Congress to sort through the
21 problems that you're suggesting, I think as a matter of
22 principle if the Federal courts can simply define their
23 own jurisdictional boundaries we just have all sorts of --

24 QUESTION: They're not defining their own.
25 They're just assuming that the congressional grant of

jurisdiction, if not the constitutional grant of jurisdiction, took into account ordinary notions of nontransitory causes of action that could only be brought in certain courts.

What about criminal jurisdiction? Can Federal courts try for State crimes? The traditional notion is that no sovereign enforces the criminal laws of another sovereign.

MR. DUCOTE: I agree.

QUESTION: Can a State attorney bring in Federal court a prosecution for a State crime?

MR. DUCOTE: No, but in the diversity cases -- and that's the unique nature of diversity jurisdiction -- diversity jurisdiction specifically deals with local causes of action, local concerns, and simply says that because of this -- in the Bullone case it's expressed, the concern about local prejudice, and then the -- sort of the equal footing that nonState parties should have in that court, that the Federal courts should have diversity of jurisdiction.

QUESTION: In some of our cases, Mr. Ducote, we've said that when Congress enacts a jurisdictional measure it takes it with knowledge of any judicial gloss on it, so to speak, such as Canon v. University of Chicago.

1 Now, this Court has been speaking about domestic
2 relations exceptions to diversity jurisdiction since the
3 turn of the century, and the Congress has revisited the
4 diversity statute several times and never made any
5 addition to it indicating that it disapproved of that
6 exception. Doesn't that suggest that your analysis is a
7 little bit two-dimensional when you simply say well, we
8 just look at the statute?

9 MR. DUCOTE: Well, the Court -- the last
10 pronouncement was in the 1930's on the domestic relations
11 exception, except for Thompson v. Thompson in 1988, when
12 in a footnote the Court talked about the tradition of the
13 domestic relations exception, and what I'm saying -- and
14 again, I don't think this is essential for us to prevail
15 in this cause of action, but I think what we have to do is
16 sort of pull that all back together and make some sense
17 out of it and get back to the issue that Congress needs to
18 set out what the parameters of Federal jurisdiction are
19 and what are the exceptions.

20 And I think Congress did an excellent job of
21 that in 1990 in the supplemental jurisdiction provision
22 under 28 U.S.C. 1367, where the Court said -- Congress
23 said the Federal courts can have supplemental jurisdiction
24 if this criteria is met, this criteria, and they may
25 choose to decline supplemental jurisdiction if State law

1 is uncertain or the issues are too complicated or for
2 other good reasons.

3 So in that case, Congress specifically
4 authorized an abstention, if you would, from jurisdiction,
5 and I think that's really what we need to do so this
6 doesn't spread further and --

7 QUESTION: Is there any suggestion that that was
8 done in the light of this Court's statement about the
9 domestic relations exception?

10 MR. DUCOTE: I think it had to do with perhaps
11 some of the other abstention doctrines, Younger v.
12 Colorado Water District, but I think if we're going to
13 have exceptions to Federal jurisdiction, or we're going to
14 allow for abstention of Federal jurisdiction, then I think
15 it should be by congressional mandate and not by judicial
16 activism.

17 QUESTION: Well, but these cases, speaking of
18 the domestic relations exception, have been on the
19 books -- our books for a long time. Are you saying we
20 should overrule them?

21 MR. DUCOTE: The specific issue in this case has
22 never been addressed by the Court.

23 QUESTION: Absolutely right, and one could
24 easily say that those cases referred to things like
25 seeking a decree of divorce, child custody, other

1 nontransitory causes of action, and that therefore your
2 case is not governed by them, but when you get into the
3 more general area, it seems to me you're arguing for just
4 a rather sweeping clearing of the brush, so to speak,
5 which I'm not sure isn't inconsistent with all our cases.

6 MR. DUCOTE: Well, I think the cases of Burrus
7 and Barber and Popovici and De La Rama v. De La Rama have
8 simply said in very broad brush strokes the relations
9 between husband and wife, parent and child, belong to the
10 States and we're not going to get involved in it, and
11 those cases have sort of set up judicial chaos for 100
12 years in all of the circuits that have led to this sort of
13 decision.

14 The fact that in 1991 a Federal district court
15 can look at sexual abuse, a sexual abuse tort action and
16 say that well, this is domestic relations under -- citing
17 Barber v. Barber in 19 -- I'm sorry, 1880, shows the
18 extent to which this issue is still uncertain.

19 So I think yes, it -- again, the principle is
20 important that either Congress sets up the parameters of
21 Federal jurisdiction or the courts do on an ad hoc basis,
22 and that's the concern, but I don't think that's the most
23 important issue here, because these kids should be able to
24 sue in tort no matter who the defendant is if there's a
25 cognizable State cause of action and the other criteria of

1 the diversity statute have been met. '

2 The other issue is the Younger abstention issue.

3 QUESTION: Counsel, before you get to that
4 point, suppose that in this case the mother was involved
5 in the proceedings in the Louisiana domestic court and the
6 court made findings of fact that the abuse had not
7 occurred? I take it that that would have operated as
8 issue preclusion in the suit that you're bringing now.

9 MR. DUCOTE: Under Louisiana law it would not.

10 QUESTION: It would not.

11 MR. DUCOTE: Louisiana probably has the most
12 restrictive issue preclusion statutes in the country.

13 QUESTION: I think that in other States it
14 would, although I'm not sure of that, and if that's so
15 then my next question would be if there would be issue
16 preclusion going back the other way, if the tort were
17 tried first, I assume it would not be a violation of due
18 process at least for a domestic court, say, that this has
19 already been litigated and it's going to accept those
20 findings.

21 MR. DUCOTE: I don't think so. You know, very
22 often in other contexts, for example in police brutality
23 cases, it's not unusual for there to be State court
24 proceedings and Federal court proceedings in the
25 prosecution as well as administratively in any number of

1 areas, so I think the law should not -- or the rules of
2 the game should not change simply because we're dealing
3 with children or because we're dealing with sexual abuse
4 and we're dealing with families.

5 I think one of the things that's happened in the
6 courts is this issue is something that people haven't
7 wanted to get involved in, and they've looked for a way to
8 sort of get rid of it, and I think in another context,
9 were it not a family context, those questions wouldn't
10 even be raised.

11 And that's sort of what the district court does
12 with the Younger issue and says well, you know, the State
13 court permanently terminated this man's rights, therefore
14 the State's interest in this case is obviously even more
15 compelling than it would be in another case, and that's
16 even more cause for us to keep out of it.

17 And I look at it and I say because his rights
18 were terminated, if you apply the Younger rules the
19 State's already finished with the case. The man is a
20 legal stranger, so it's even more compelling it should be
21 in Federal court.

22 So again I think the rules have to be
23 clarified -- family, no family, whatever. If it meets the
24 criteria of the statute, unless Congress exempts it it
25 should be adjudicated. As has this Court said in Deakins

1 v. Monaghan, the Federal courts have an unflagging duty to
2 adjudicate cases that are properly in their jurisdiction.

3 QUESTION: Mr. Ducote, was there any equitable
4 relief sought in this case?

5 MR. DUCOTE: Absolutely none. It was
6 straightforward tort action for compensation.

7 QUESTION: It might be a different case if there
8 were equitable relief. I mean, would you have any problem
9 with the Federal court using its power to decline to
10 exercise equitable jurisdiction on the basis that family
11 law matters, even more broadly than divorce and status and
12 affiliation and so forth, shouldn't be addressed by
13 Federal courts?

14 MR. DUCOTE: I have no problem with that, and as
15 Justice Kennedy discussed in the case of McIntyre v.
16 McIntyre in the Ninth Circuit, when issues of status are
17 not involved and the court -- the Federal court has not
18 asked to impinge on the State supervision of a minor and
19 it's just simply an issue of compensatory damages, it's
20 like every other case, and again we just can't simply say
21 well, this is family business and we don't like to be
22 involved in family business that --

23 QUESTION: Counsel, I'm interested from a
24 practical point of view. What is the great attraction for
25 you of a Federal court in Louisiana?

1 MR. DUCOTE: Well, I think there are two points.
2 One is that the Federal Rules of Evidence, because of not
3 only the rules themselves but because of Federal court
4 decisions in child sexual abuse cases, provide a better
5 opportunity for the evidence that is available in this
6 case to be presented to a jury.

7 The second question is the fact that one of the
8 respondents is an attorney in this case who practices in
9 the local State court where the case would have to be
10 brought. These are the traditional sort of concerns that
11 are the underpinnings of diversity jurisdiction.

12 We think that these out-of-State plaintiffs
13 having to go into a State court where one of the
14 respondents is a practicing attorney might not receive as
15 fair a shake as they would in the Federal court.

16 And if there are no other questions I would
17 reserve the balance of my time for rebuttal.

18 QUESTION: Very well, Mr. Ducote. Mr.
19 Weidenfeld, we'll hear from you.

20 ORAL ARGUMENT OF PAUL S. WEIDENFELD

21 ON BEHALF OF THE RESPONDENTS

22 MR. WEIDENFELD: Mr. Chief Justice and may it
23 please the Court:

24 The first issue here is whether or not there is
25 a domestic relations abstention to Federal court

1. jurisdiction. This Court since 1859 in Barber has stated
2 that there is one.

3 QUESTION: Mr. Weidenfeld, you just use the word
4 abstention. Did you mean exception?

5 MR. WEIDENFELD: I did. I did, Your Honor --
6 Mr. Chief Justice, excuse me.

7 Is there an exception to Federal jurisdiction
8 for domestic relations? This Court has said since 1859
9 there is such an exception to jurisdiction. I think from
10 1859 to 1930, 71 years passed. There were three
11 intervening cases which reaffirmed that doctrine, and in
12 1930 Justice Holmes reaffirmed it yet again, allowing that
13 doctrine to defeat the original jurisdiction of the
14 Federal courts in matters involving consulates, and that was
15 of course Papovici v. Agler.

16 QUESTION: Of course, that general proposition
17 doesn't give us the answer to this case, yet.

18 MR. WEIDENFELD: No, it doesn't Your Honor, but
19 of course this Court has asked to address that issue, at
20 least in brief, and I think that as a matter -- it has to
21 be accepted that there is a domestic relations exception
22 to jurisdiction. Either there is or there is not, and I
23 suggest that there is, that Congress has had 130-some-odd
24 years, 13 separate terms, to modify it, abolish it, do
25 something to it, and they've never taken the opportunity

1 to do so.

2 QUESTION: Mr. Weidenfeld, do you think the
3 exception which you would have us continue to recognize is
4 based on the Constitution, or is it something statutory?
5 Can Congress change it?

6 MR. WEIDENFELD: I think that the exception goes
7 back to the concept of the Tenth Amendment in that it
8 actually was a matter not delegated to the Federal
9 Government. I think that the common understanding, as
10 Justice Holmes said, was that domestic matters are matters
11 unique to the States and belong to the States.

12 QUESTION: So you don't think Congress could
13 directly address this, and for instance in the parental
14 kidnapping case direct Federal courts to have jurisdiction
15 of certain family related matters?

16 MR. WEIDENFELD: The common understanding at the
17 time was that matters domestic -- that is, matters
18 involving parent and child, husband and wife, were
19 excluded from the jurisdiction of the Federal courts in
20 that --

21 QUESTION: Yes. Would you answer, though, the
22 question I asked? Do you think Congress can enact laws
23 such as the parental kidnapping case and give Federal
24 courts jurisdiction over matters that do relate, in a
25 sense, to family matters?

1 MR. WEIDENFELD: Well, I think that --

2 QUESTION: Yes or no.

3 MR. WEIDENFELD: No, not as it stands, and this
4 Court has found that it did not, of course, in Thompson v.
5 Thompson.

6 I would make a caveat to my no, and that is, is
7 a kidnapping act a domestic matter, is the question. That
8 is, how far does the -- how far is there the exception to
9 jurisdiction? What is excepted from jurisdiction -- what
10 domestic matters? What constitutes a domestic matter?

11 I think what constitutes a domestic matter --

12 QUESTION: -- you're pressing for an exception
13 to Federal jurisdiction. Would it be correct to say that
14 we're really talking about abstention rather than
15 exception?

16 MR. WEIDENFELD: No, not in the context of the
17 domestic relation exception to jurisdiction. I'm talking
18 about abstention in relation to Younger, but not in
19 relation to the -- if domestic matters are excepted from
20 jurisdiction, then it's not an abstention doctrine. Then
21 there either is jurisdiction or there is not. Either it
22 is a matter domestic, or it is not.

23 QUESTION: Well, they certainly are different,
24 but I'm wondering if all through the years we're really
25 speaking of the Federal courts abstaining from getting

1 into this area rather than formulating a nonstatutory
2 exception, so to speak, to diversity jurisdiction. .

3 MR. WEIDENFELD: Well, the -- the broader
4 concepts I think lead to the same place. The broader
5 concepts are the interrelationship between the Federal
6 Government and the State governments, so that gets to the
7 same place, but this Court has spoken about domestic
8 relations as an exception itself to jurisdiction, so the
9 question is what makes it domestic?

10 If it is a matter reserved to the State, what
11 makes it domestic, and my answer is that you have to look
12 to the States and have the States created' -- and do the
13 States give us guidance, and they do.

14 QUESTION: Well, isn't it dangerous to read into
15 the Constitution what isn't there, to wit, a domestic
16 relations exception to Federal jurisdiction, and aren't we
17 on sounder ground if we were talking about abstention, as
18 maybe the Court should have done over the years?

19 MR. WEIDENFELD: Well, it is always dangerous to
20 read things into the Constitution. I think that this
21 Court has decided, or at least has held, that it is
22 jurisdictional, and Congress has never decided to take
23 that position on.

24 If it -- if this Court wishes to rephrase the
25 language and call it abstention, that is something that it

1 can do, but the object is that if it is abstention --
2 whether it's abstention or jurisdiction, although this
3 Court calls it jurisdictional, we have to get to how do we
4 define what a domestic matter is?

5 The States have defined what domestic matters
6 are. The States have significant rules that abridge the
7 rights of individuals to sue within the family unit.
8 Fathers cannot sue their wives, cannot sue mothers.
9 Children cannot sue their parents. It was incorrect for
10 counsel to say that had John Richards run over his
11 daughter, she could have sued him in State or Federal --
12 in Federal court because he was her father, if it happened
13 while he was her father.

14 QUESTION: But that really is a question of what
15 law is applicable, isn't it, rather than whether there's
16 jurisdiction? I mean, if that is the rule in Louisiana,
17 presumably the same result will obtain on the merits no
18 matter whether it's in the State court or in the Federal
19 district court?

20 MR. WEIDENFELD: That's correct, Your Honor, my
21 point being that the States have -- that each State has
22 its own set of rules involving parent -- the domestic
23 harmony, and the results that involve the
24 interrelationship between spouses and between parents and
25 children. The Federal courts and the Federal Government

1 has always deferred to that for the simple reason that
2 domestic matters are unique to the States.

3 QUESTION: Well, we may have deferred to it, but
4 it doesn't make it jurisdictional, does it?

5 MR. WEIDENFELD: Well, by this Court's phrasing
6 of the -- by this Court's prior determinations that
7 domestic matters are jurisdictional, the question that
8 leads to is, is it a domestic matter, and how do we decide
9 if something involves the domestic relations. That's how
10 it seems to come to me, and when you're deciding is
11 something a domestic matter or not, you have to see it's
12 going to be the same considerations as in an argument that
13 involves comity, that involves *Younger v.* --

14 QUESTION: So you think it's -- your criterion
15 of what is domestic looks to the State law of capacity, is
16 that what you're saying?

17 MR. WEIDENFELD: I'm saying that's a factor.
18 I'm saying -- yes to the extent that you look to, not just
19 Louisiana, all States have very particular rules as
20 between suits between spouses and suits between children.
21 In fact, the common law I think until this century did not
22 permit -- well, I know until this century, did not permit
23 suits as between spouses, nor did they permit suits as
24 between parent and child. They simply didn't permit it.

25 So they have taken control -- they have wrested

1 control of this area, of the area involving parent and
2 children, husband and wife, without any question by
3 anybody, and the reason is because it is a matter uniquely
4 unto the State, so you look narrowly at an individual law,
5 but the scope, these -- the areas involving suits between
6 children, or suits between spouses, or a child and their
7 father, are a matter of the domestic relations. The
8 considerations have always been domestic -- the harmony of
9 the family and the peace of the family.

10 QUESTION: So in any case these are sort of
11 pointers as to what presumably the Court may have had in
12 mind and Congress may have had in mind perhaps in
13 ratifying what we did, but you're not making the argument
14 that every State law with respect to capacity is
15 jurisdictional --

16 MR. WEIDENFELD: No.

17 QUESTION: With respect to Federal jurisdiction.

18 MR. WEIDENFELD: No, Your Honor, I'm not making
19 that argument, and I'm not making the argument that any
20 tort involves -- is domestic. I think that's a matter for
21 the sound discretion of the Court. That's a matter that
22 the district judge has to look at and say, is this a
23 domestic matter?

24 When you get to the heart of it, are we talking
25 about a matter that will be domestic, and if so, then we

1 don't handle it because the Federal courts never have
2 handled domestic matters, and I don't think that Judge
3 Arceneaux's discretion should be overturned, that he made
4 an abuse of that discretion.

5 QUESTION: If a wife kills her husband somehow
6 in violation of Federal law is it your position that a
7 Federal criminal court could not entertain the suit
8 because that involves domestic matters?

9 MR. WEIDENFELD: I have not addressed the
10 interplay between the --

11 QUESTION: I know you haven't. That's why I
12 asked you the question.

13 MR. WEIDENFELD: Would you repeat the question,
14 Your Honor?

15 QUESTION: If a wife kills her husband in some
16 manner that violates Federal law, using a handgun that's
17 been carried interstate or something like that, is it your
18 position that there can be no Federal prosecution because
19 it's a domestic matter?

20 MR. WEIDENFELD: No.

21 QUESTION: Well, why is that different from a
22 tort in which a wife hits her husband, and then the next
23 question is going to be why is that different from a tort
24 in which a father hits his son?

25 MR. WEIDENFELD: Because Congress has made that

1 a crime. Congress has specifically stated that it's a
2 crime, and I don't think that the common understanding
3 that Federal crimes -- that crimes that occurred at the
4 time of the Constitution, if it was a Federal crime it
5 would have been in Federal court, domestic or otherwise.

6 QUESTION: This is not a spouse-killing Federal
7 crime, it's a general Federal criminal statute. You
8 cannot -- you know, any crime committed with the use of a
9 handgun that's been carried interstate, and it so happens
10 that a wife kills her husband in violation of that
11 statute. It's not a specific Federal spousal statute.

12 MR. WEIDENFELD: But there's -- the answer is
13 there has never -- at least my answer is there has never
14 been any case that has excluded that as a matter of being
15 a domestic case, whereas there have been in the civil
16 arena.

17 Had there been such a case, it is my guess that
18 Congress would have looked at it and said you have
19 extended the domestic relations doctrine a bit far. It is
20 a -- if it's a Federal offense, then the Federal criminal
21 courts should handle that matter.

22 QUESTION: May I ask you, among these cases --
23 I'm just not as familiar as I should be with the earlier
24 cases. How many of the earlier cases was jurisdiction
25 sought to be invoked on the basis of diversity of

1 citizenship? Are there some?

2 MR. WEIDENFELD: No -- No, Your Honor.

3 QUESTION: They were -- under the Popovici case
4 they were trying to -- suing under Bassett or something or
5 something like that, wasn't it?

6 MR. WEIDENFELD: Under the original jurisdiction
7 of the Court, and In re Burrus it was a habeas case --

8 QUESTION: Right.

9 MR. WEIDENFELD: In Simms and De La Rama, they
10 were both cases that emanated from the territories.

11 QUESTION: What is your answer if a child is
12 battered, receives severe injuries and sues for medical
13 payments, sues the father through a next friend?

14 MR. WEIDENFELD: In Federal court?

15 QUESTION: Yes.

16 MR. WEIDENFELD: Is it during -- the tort
17 occurred during the existence of the marriage?

18 QUESTION: Yes.

19 MR. WEIDENFELD: Then it's going to be a
20 matter --

21 QUESTION: This is a child suing the parent.

22 MR. WEIDENFELD: That would be a matter that
23 would go to the -- that would fall within the domestic
24 relations exception and it should go to State court as a
25 part of the State court's unitary system that involves

1 their special interest in the family, because when you're
2 dealing with the family, that is a matter that is uniquely
3 the State's concern -- the health and well-being of the
4 domestic harmony of the families within it.

5 I don't think -- I think it goes without saying
6 that the State's interest in the family as a unit is
7 strong and is unique and is very basic to the sovereignty
8 of the State. In support of that interest, what the
9 States have done is they have -- or various States have
10 done it in various ways but they have tried to come up
11 with a unitary way or means of dealing with matters that
12 evolve from domestic disputes.

13 So that there is the juvenile court system,
14 there is the divorce and custody -- as in fact in this
15 case. This matter ended up in criminal courts, in two
16 separate criminal courts, in a juvenile court, in a
17 custody court, and three separate court of appeals.
18 There's -- the State has recent -- the State of Louisiana
19 at least has recently brought together all their juvenile
20 court laws into a 700-page tome and each State, each State
21 in this country is trying to do the same thing. They're
22 trying to bring together the laws and treat it in a
23 unitary way.

24 The factors that are always in support of
25 comity, of the doctrine of *Younger v. Harris*, is that you

1 don't want to disrupt this unified body. You don't want
2 to risk the Federal courts giving de novo trials after
3 State matters.

4 The normal circumstance in which this case is
5 going to come to a Federal court is not from the winning
6 party but from the losing party. The losing party in the
7 State action is going to try and relitigate the matter
8 through the Federal courts. That's the normal way in
9 which this case -- this is the usual way in which this
10 case is going to come to the Federal courts. That's the
11 way it's going to come in all -- in most other cases, to
12 use the United States district court as a court of review
13 for fact-finding unfavorable to the person while they were
14 in the State.

15 QUESTION: Mr. Weidenfeld, a few minutes ago you
16 were asked by Justice Stevens whether there had been any
17 cases sounding of diversity jurisdiction in which this
18 statement as to the domestic relations exception had been
19 announced. What do you conceive the basis of the Federal
20 jurisdiction to have been in the case of Barber v. Barber?

21 MR. WEIDENFELD: That was diversity, Mr. Chief
22 Justice. I apologize. That was the enforcement of an
23 alimony decree, and that was in --

24 QUESTION: Yes, and that certainly suggests that
25 even back then, December term 1858, that the Court saw

1 definite limits to the domestic relations exception,
2 doesn't it? I mean, didn't they allow there the
3 enforcement of a New York judgment for alimony?

4 MR. WEIDENFELD: Yes, they did, Mr. Chief
5 Justice, and the -- so that yes, I agree that there is a
6 limit to it. It does not go forever.

7 You have to draw a line somewhere, and how do
8 you draw the line, and who draws that line, and I
9 suggest -- the way I would suggest that the line be drawn
10 is whether the matter sued upon occurred during the
11 existence of the -- during the marriage, because if it
12 occurred during the existence of the marriage, those are
13 the matters in which the State has taken a particular
14 interest.

15 If it's something that occurs after the
16 marriage, then there's not going to be any revisitation of
17 any of the facts around the divorce or around the custody
18 decrees or around the alimony decrees. If it occurs --
19 that's if it occurs after the marriage has terminated, but
20 if it occurs before the marriage has legally terminated,
21 as happened in this case, then all of those factors, all
22 of those actions are going to be -- are involved in the
23 divorce case itself.

24 QUESTION: But Mr. Weidenfeld, the State court
25 is through with this case. It's awarded custody to the

1 mother, the marriage is terminated, only money damages are
2 sought. It seems to me this is a perfect case for Federal
3 diversity jurisdiction.

4 MR. WEIDENFELD: Justice O'Connor, these cases
5 never end. The custody of the children is always, in all
6 instances, subject to review, so much so that for a long
7 time custody judgments were not even considered final
8 judgments for the purpose of full faith and credit, so the
9 case never ends.

10 If in this case we come and there is a jury
11 interrogatory which determines that no abuse occurred --
12 and no abuse did occur. These are allegations. There has
13 never been a full and -- a true and full hearing in this
14 matter. I mean, the only hearings have been where
15 Mr. Richards was unable to present a defense because he
16 was about -- because he had criminal charges hanging over
17 his head and elected on advice of counsel not to expose
18 his defenses.

19 But when there is a full-blown hearing, a full
20 trial, and then the facts are revisited, or actually in
21 this instance visited at the first instance and the
22 factors that come out show that no abuse occurred, or that
23 the abuse occurred at the instance of the mother, or
24 that -- or for whatever other contradictory verdict comes
25 down, someone -- it may not be Jon Richards because his

1 parental rights have been terminated, but someone is going
2 to go back to the State court, or someone ought to go back
3 to the State court and say is the best interest of this
4 child such that we should not now revisit this in light of
5 all the evidence which has finally come to bear?

6 QUESTION: In Louisiana, is it open to a third
7 party stranger to come in and reopen a question like that?

8 MR. WEIDENFELD: Well, it is always a matter
9 that's open. The State represents the children, and often
10 cases it's the State taking away children as against both
11 parents, so the State would have the responsibility, I
12 would suggest, to reopen that matter.

13 QUESTION: In another sense that doesn't help
14 you, though, because if the Federal court enters a
15 judgment making certain findings as, let's say the child
16 abuse did occur, if the proceeding is always open in
17 Louisiana and if Louisiana does not give preclusive effect
18 to that determination, the jurisdiction of the Louisiana
19 court remains unfettered and unconstrained by the Federal
20 judgment.

21 MR. WEIDENFELD: That's -- that would be
22 correct, and what -- but what would happen is you now have
23 the Federal courts telling the State courts that we
24 don't -- that really you haven't done it correctly.
25 You've come to the wrong result. You need to relitigate

1 this matter.

2 QUESTION: But the State court is just as free
3 as it would have been if there had been no Federal
4 proceeding at all, as I understand both your submission
5 and that of your opposing counsel.

6 MR. WEIDENFELD: That's correct.

7 QUESTION: Well, couldn't -- are you agreeing
8 that you could not claim collateral estoppel, an offensive
9 use, let's say, of collateral estoppel in a State court if
10 the State proceeding is left open and there has been a
11 determination and judgment in the Federal proceeding?

12 MR. WEIDENFELD: That there'd be no collateral
13 estoppel as between the State proceeding and the Federal
14 proceeding?

15 QUESTION: No, the other way around. Let's -- I
16 thought you were saying the State proceeding is never
17 closed, so there's no judgment and therefore no preclusive
18 effect running from the State proceeding binding on the
19 parties in the Federal proceeding, but if the Federal
20 proceeding goes to judgment and the State proceeding is
21 always open, one could make, I presume, either offensive
22 or defensive use of collateral estoppel if one reopens the
23 State proceedings based on findings of fact made in the
24 Federal tort action.

25 MR. WEIDENFELD: That -- yes, that's correct.

1 QUESTION: Okay.

2 MR. WEIDENFELD: And what would happen is
3 that -- and then you see what happens. A party loses in
4 the State and says well, wait a minute, since I can reopen
5 this matter, I'm going to hop over into the United States
6 district court to relitigate my case because I have a
7 friendlier -- I perceive myself to having a friendlier
8 forum there. I have more favorable laws, as is suggested,
9 and so I get to redo the whole case, which you wouldn't be
10 able to do in the State court.

11 QUESTION: But Mr. Weidenfeld, there are a lot
12 of tort actions that could have an effect on a custody
13 decree.

14 I mean, a tort action by a total stranger
15 against the mother who has been given custody on the
16 ground that she was a drunken driver and injured -- or on
17 the ground that she was violent and whipped the
18 plaintiff's child, I mean, that would be an indication in
19 the State courts, wouldn't it, of the mother's incapacity
20 or unsuitability to have custody of the child?

21 Now, is that tort suit to be disallowed in
22 Federal courts as well because it might have a collateral
23 estoppel effect on the State custody proceeding?

24 MR. WEIDENFELD: No. My test is whether or not
25 it occurred during the existence of the marriage and it

1 involves the State interests vis-a-vis parent --

2 QUESTION: Well, I know that's your test because
3 it fits your case, but I don't know why the one is any
4 more logical than the other.

5 MR. WEIDENFELD: Well, the State has no interest
6 or no involvement in the other, per se.

7 I know that this Court has never extended
8 Younger to a diversity case and -- but I suggest that the
9 State interests are the same as in a diversity case, and
10 the Federal interests if anything have decreased.

11 QUESTION: But for Younger, even in the criminal
12 context there has to be a pending proceeding, doesn't
13 there, a pending proceeding in the State court?

14 MR. WEIDENFELD: There does, and I think that
15 the pending proceeding is the -- and this is a stretch
16 which I admit, but the pending nature of the proceeding is
17 that custody is always pending, is always on-going,
18 because the State's interest never ends.

19 QUESTION: Well, we don't need a domestic
20 relations exception then, if we have that sort of an
21 abstention doctrine. It's to accomplish exactly the same
22 purpose.

23 MR. WEIDENFELD: I agree with that. I agree
24 absolutely with that. I mean, the same purpose can be
25 achieved in either way, and I think the purpose ought to

1 be achieved, and the purpose that ought to be achieved is
2 that the State -- that the Federal court in this instance
3 is not to be used by disgruntled litigants. In this case
4 they're not a disgruntled litigant, but that's what's
5 normally going to happen, to be used to review or revisit
6 or to gain some advantage. I don't think that that's the
7 purpose of the Federal courts.

8 QUESTION: Counsel, one question for
9 clarification. Let's assume that the domestic relations
10 exception applies to the father, respondent Richards. How
11 does it apply to his companion, respondent Kesler?

12 MR. WEIDENFELD: It would not -- well, in two
13 ways. One, she is in effect the co-respondent, and there
14 is the eternal triangle. It's a domestic matter.

15 It's a three-edged sort of triangle -- mother,
16 the new girlfriend, and the father -- so in that sense --
17 and in Louisiana you couldn't marry a proven co-
18 respondent, but I think the easier way that it works is
19 that once it's -- once it is Jon Richards, if that -- if
20 there's no jurisdiction in that case, then the girlfriend,
21 as opposed to having them in two instances, you come very
22 close to a Colorado River type situation where you've got
23 litigations in parallel jurisdictions and it would -- the
24 duplication of resources, it wouldn't make sense to have
25 the two, so the one would -- the one against the

1 girlfriend would come back over to the State.

2 I would only close by saying that there needs to
3 be some way to determine what is a matter that is
4 domestic, and I think that that ought to be a matter that
5 goes to the discretion of the court, of the trial court.
6 They're in the best position to make that determination,
7 and that Judge Arceneaux in this instance did not abuse
8 his discretion.

9 Thank you.

10 QUESTION: Thank you, Mr. Weidenfeld.

11 Mr. Ducote, you have 11 minutes remaining.

12 REBUTTAL ARGUMENT OF RICHARD LYNN DUCOTE

13 ON BEHALF OF THE PETITIONER

14 MR. DUCOTE: Mr. Chief Justice and may it please
15 the Court:

16 I think there are a number of situations where a
17 State court action can result in a Federal -- or the facts
18 that result in a State court action can result in a
19 Federal action, and we don't have all of this fear. For
20 example, you can have a criminal conviction in State court
21 and then a tort action among the same players, the
22 perpetrator and the victim, and if there's a decision in
23 the Federal court action based on diversity that is
24 contrary to the State court criminal proceeding it's no
25 basis to go back and reopen the criminal court proceeding.

1 Just as in this case, this man's parental rights were
2 terminately and unalterably and permanently terminated in
3 an unappealed final decision. That's it. The case is
4 over.

5 QUESTION: He could never get custody back.

6 MR. DUCOTE: He would have no right of action
7 under State law because he's a legal stranger to the
8 children. The case is over and done with.

9 Now, people can go into domestic court on all
10 sorts of reasons and try to reopen cases. The fact that
11 people can attempt to do things doesn't mean that the
12 whole constitutional and congressional grant of
13 jurisdiction should then tremble and say well, you know,
14 this might happen, this might happen and this might
15 happen. He's over and done with as far as the children
16 are concerned as a matter of State law.

17 QUESTION: Well, most -- all of us I guess react
18 by where our own practice was. Where I practiced, you
19 could -- you would -- a father who was denied custody
20 could have some years later come back in and moved to
21 reopen that saying look, the mother is not proving to be a
22 good custodian, there are new facts available, the money
23 is situated differently, the child is now 14 years old and
24 expressed a desire to live with me, and the decree would
25 be reopened. That doesn't happen in Louisiana.

1 MR. DUCOTE: Well, commencing about the 1970's
2 virtually every State has enacted termination of parental
3 rights statutes because of the child abuse problem. The
4 denial of custody is different than what happened here.
5 This is a permanent termination of all parental rights,
6 meaning he doesn't even have the right as another parent
7 would to come in and seek custody. He's not on the same
8 footing any more, and he's permanently enjoined from any
9 contact.

10 QUESTION: Would you be here making the same
11 argument if instead custody had been awarded to the mother
12 but no termination of parental rights? Would you still
13 think that the Federal courts should entertain the tort
14 action?

15 MR. DUCOTE: Certainly. I don't think that has
16 any bearing. I think that made this a clearer case for
17 review because his parental rights were terminated, but I
18 don't think that in and of itself has any bearing because,
19 as Justice Blackmun questioned, is this an exception, or
20 is it abstention, and if it's going to be abstention, then
21 it has to be one of the abstentions that the Court has
22 recognized -- Younger, but again doesn't apply because
23 there are no pending State actions.

24 So again if it meets the diversity criteria and
25 it's a diversity case, then the Federal court has to do

1 what Congress says it's supposed to do -- hear the case,
2 decide on the merits, award damages, don't award damages,
3 whatever the jury decides, and what happens in the State
4 court proceedings will happen, and that's to be dealt with
5 separately.

6 If there are no other questions --

7 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Ducote.
8 The case is submitted.

9 (Whereupon, at 12:02 p.m., the case in the
10 above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents and accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

NO. 91-367 - CAROL ANKENBRANDT, AS NEXT FRIEND AND MOTHER OF
L. R. AND S. R., Petitioner V. JON A. RICHARDS AND DEBRA KESLER

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Ann-Marie Federico

(REPORTER)